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IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 174

WILLIAM SHEINER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT A. BLINDER
STEPHEN HOCHHAUSER
Attorneys for Petitioner
655 Madison Avenue
New York, New York 10021

BLINDER AND STEINHAUS
Of Counsel

Dated, May 27, 1969

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Opinions Below

The opinion in the Court of Appeals, as yet unreported, appears in the Appendix, *infra,* pp. A 1-14. The opinion of the District Court denying the petitioner's motion for a new trial, as yet unreported, appears in the Appendix, *infra,* pp. A 15-18. The official report of the opinion in the District Court appears at 273 F. Supp. 977, and in the Appendix, *infra,* pp. A 20-33.

Judgment

The judgment of conviction and sentence was dated and entered in the United States District Court for the Southern District of New York on November 21, 1967.

The decision affirming the judgment was entered in the United States Court of Appeals for the Second Circuit on April 4, 1969.

Jurisdiction of this Court

Jurisdiction of this Court is conferred under Title 28 U.S.C., §1254(1).

Questions Presented

(i) Does joint representation of co-defendants accused of conspiracy to sell fraudulently altered coins involve an inevitable conflict of interest when:

A. Petitioner was acting solely as a sales agent for a commission and was in a position to try to absolve himself by placing all the blame on his co-defendant; and

B. The trial tactics employed by counsel for both were unfavorable to petitioner, but helpful to his co-defendant, i.e.: (1) waiver of trial by jury; (2) decision that neither defendant should testify, but that petitioner's defense of total reliance on his co-defendant's representations should be made solely by introducing his Grand Jury testimony into evidence; and (3) the decision not to call certain witnesses whose testimony would help prove that petitioner was a victim of his co-defendant's misrepresentations.

(ii) Is Canon 6 of the Canons of Professional Ethics, dealing with waiver by a client of a conflict of interest, at least the minimum required under the Fifth and Sixth

Amendments? If so, has the trial judge satisfied its duty by telling the petitioner only that there is a possibility that his attorney has a conflict of interest and that he should talk it over with his attorney when, in fact, the attorney then tells petitioner that separate counsel is not necessary, and fails to describe in detail the nature of the conflict, the potential dangers and the possibilities of prejudice.

Constitutional Provisions and Regulations Involved

United States Constitution: Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution: Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Canons of Professional Ethics: Canon 6

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, *except by express consent of all concerned given after a full disclosure of the facts.* Within the meaning of this canon, *a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.*" (Emphasis added.)

Statement of the Case

Petitioner, William Sheiner (hereinafter "Sheiner"), and a co-defendant, Victor C. Piacentile, a/k/a Victor Pease (hereinafter "Piacentile"), were indicted on June 20, 1966. They were charged with conspiracy to defraud by use of the mails in selling spurious coins (pennies) as genuine mint errors. The indictment also charged them with the substantive offenses (A 21).*

Sheiner was the owner and operator of a retail coin business, Bronx Coins (A 22-23). He subscribed to a teletype service through which coin dealers communicated with one another. On or about May, 1965, Piacentile entered Sheiner's store and showed him some 1964 pennies which appeared to have been multi-struck. Piacentile asked Sheiner to act as an agent in selling the coins in consideration of a commission (A 23).

* References designated "A" are to the appendix.

The story that Piacentile related to Sheiner and others was that he had purchased a quantity of sealed bags of 1964 pennies which came from the Federal Reserve. (R90-91; G.J. Sept. 10, 1965, pp. EJC9; Sept. 22, 1965, pp. SA 5-6; EJC2).* He claimed that he was speculating that the then existing coin shortage would result in their having greater intrinsic value than their monetary value (R91; G.J. Oct. 13, 1965, pp. SA7-8). After a while, when their coin value did not increase, Piacentile alleged that he decided to cash them in, but before doing so, as he was a coin collector, he told his children to look through them to see whether there were any mint errors (R91). Piacentile claimed that it was his children who first discovered the multi-struck coins, that some were found in each bag his children had opened, and that he had many bags left from the same series which, he assumed, contained additional coin errors (R91; G.J. Oct. 13, 1965, p. SA12).

A dispute arose about the authenticity of the coins. The Retail Coin Dealers Association authenticated the coins (G.J. Sept. 22, 1965, p. EJC1), but the leading coin magazine, U. S. Coin World, charged that the coin error was not genuine (G.J. Sept. 22, 1965, p. EJC7). The U. S. Mint denied that the coin was a genuine error, but made no attempt to confiscate the coin.

A Grand Jury convened and subpoenaed Piacentile, who engaged the services of Herbert S. Siegal as counsel. Piacentile told Sheiner that he refused to testify because he wanted to protect his secret—the serial numbers on the

* References designated "R" are to the trial transcript. References designated "G.J." are to Sheiner's Grand Jury testimony in evidence as Trial Exhibit 10.

Federal Reserve bags—to prevent the Government from locating and removing from the market any others from the same series (G.J. Oct. 13, 1965, pp. SA8-9) (Trial Exhibit 13).

When Sheiner was subpoenaed to testify before the Grand Jury in September, 1965, he spoke to Siegal and was advised to testify truthfully (G.J. Sept. 10, 1965, pp. MTC6-7). A period of eight months elapsed between Sheiner's three appearances on September 10, 22 and October 13, 1965, and his last appearance June 10, 1966 (Trial Exhibit 10). During that period Sheiner had no indication from the Government that the coins were forgeries. They were not seized, he was not enjoined, and the U. S. Coin Exchange reinstated the coins following the brief period of suspension caused by the Government's actions (G.J. Sept. 22, 1965, pp. EJC7-8).

Two weeks after the indictment, Piacentile told Sheiner he would underwrite the entire cost of the case, but that at the moment he needed to borrow five thousand dollars to help pay for the attorney. Sheiner agreed to lend Piacentile the money on condition that Piacentile's oral guaranties of the authenticity of the coins be reduced to writing. The documents were then predated to reflect the approximate dates of the oral guaranties (SM35-38).*

Sheiner discussed his contemplated use of Piacentile's attorney with a personal friend, Sidney E. Rubenstein, who was a lawyer. According to Rubenstein:

> "I told him [Sheiner] that I felt he might want to have a lawyer other than the co-defendant's attorney

* References designated "SM" are to the minutes of the hearing on petitioner's motion for a new trial.

> [Mr. Siegal] because there might be defenses available to him [Sheiner], that were not available to the co-defendant, Piacentile, since Sheiner was just selling the coins as agent for Piacentile. I told him that I was not experienced in criminal cases, and if he so desired I would recommend a lawyer to him." (Stipulation of Testimony of Sidney E. Rubenstein)

Thereafter Mr. Rubenstein spoke to Siegal on the telephone. According to Rubenstein:

> "Mr. Siegal told me that, *in his opinion, separate counsel was not needed and that he would represent both Sheiner and Piacentile.*" (Stipulation of Testimony of Sidney E. Rubenstein) (Emphasis added.)

At the hearing Siegal readily acknowledged that he had never felt that there was a conflict of interest (SM88-90), and had advised Sheiner that there was no need for separate counsel (SM90).

On the second day of trial, the jury had been waived, eleven witnesses had testified and nine exhibits were already in evidence (R 175-176). The prosecutor was in the process of reading into the record portions of Sheiner's Grand Jury testimony. When he reached Sheiner's narration of how Piacentile had first approached him and asked him to act as his agent to sell the coins, the Court immediately interrupted to raise the subject of a conflict of interest. The following occurred (R 188-190):

> "The Court: Well, in view of the Government's claim at this point, which may come as a surprise to the defendants, I would like to alert Mr. Sheiner to the fact that if he in any way feels there is now a con-

flict of interest between the two defendants, I will certainly entertain his request for separate counsel.

"I know you are represented by eminent counsel, Mr. Sheiner, one of experience and one of reknown, (sic) in this city. On the other hand, we now have testimony that the Government is going to claim that you received these coins from Mr. Piacentile. There may be a conflict, and if at any time you feel that you may be in position of having competing interests with Mr. Piacentile, please let me know and I will certainly give you time to talk it over with counsel and perhaps get another attorney.

"On the other hand, my mind is wide open. I have not made any conclusions or decisions.

"The Government is now claiming that you obtained the coins from someone else. In view of that there might be a difference in your status, you see.

"Mr. Siegal: May we have a moment?

"The Court: Surely.

"Mr. Siegal: Than you, sir.

"The Court: You may proceed, Mr. Tuerkheimer.

"Mr. Tuerkheimer: The Government now calls Mr. Fernando Maura."

At the hearing on this motion Siegal testified to what he told Sheiner during the recess:

"* * * at the suggestion of the Court that we go out and have a discussion I explained the same to him and said: 'Look, you heard the judge. There may be a conflict of interest here because of the fact that actually you did not get the coins originally. You got the coins from Piacentile, so possibly there is a conflict of interest'." (SM88-89)

* * *

"I explained to him [Sheiner] that I did not think, and hadn't thought up to that time, that separate

counsel were necessary or that there would be a conflict of the position of both defendants, that neither one had noticed it and for that reason I did not think there would be any conflict of interest." (SM90)

The next day the record was made to reflect what had transpired off the record on the previous day:

"The Court: Mr. Sheiner, you recall yesterday I made some comment about the possibility that there may be a conflict of interest between your position and Mr. Piacentile's but I indicate if you thought there might be I would give you an opportunity to obtain an attorney and, in any event, think about it and talk it over with your counsel. Now I understand that you have thought about it, you have considered it, weighed all the aspects of this case, and decided to proceed with Mr. Siegal? Is that correct?

"Defendant Sheiner: That is correct.

"The Court: Very well." (R 342)

The District Court denied Sheiner's motion for a new trial based on his claim of conflict of interest (A 15-18). The District Court argued that most of the facts involved in Sheiner's separate defense of reliance on his co-defendant—which gave rise to the possible conflict—while perhaps not presented by their joint attorney through testimony, was nonetheless in the record. The entire transcript of Sheiner's Grand Jury testimony was introduced in evidence. This was the only effort which could be construed as an attempt by Siegal to present Sheiner's separate defense. In fact, at the conclusion of the trial, Siegal's post-trial memorandum, at page 32, contained only one short reference to those minutes:

"Often the line between honest belief and purposeful misrepresentation is fine and distinct, between the two however lies guilt or innocence, and where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand. *U.S.* v. *Falcone,* 311 U.S. 205.

"And on this question, we respectfully refer to [sic] the Court to the testimony given before the Grand Jury by Sheiner. We say that his testimony is the testimony of a man unafraid and with the inherent feeling that when you [sic] got the right on your side, you've always got the edge, and to fully and freely answer any question put to you, give them whatever exhibits they ask for whether they are entitled to it or not, without any reservation. We respectfully submit Sheiner's testimony, a portion of which is annexed to this memorandum and marked 'Exhibit C' destroys any idea of wrongful intent on the part of *these* defendants." (Emphasis added.)

This hardly qualified as an effort to exculpate Sheiner because of his reliance on his co-defendant's representations.

The Second Circuit viewed the colloquy on the second day of trial (R 188-90) and the quoted conversations between Sheiner and Siegal (SM88-90) as "adequate" notice for constitutional purposes, and that, in view of the introduction in evidence of Sheiner's Grand Jury testimony—in which the finder of fact could have found some of the essential elements of Sheiner's separate defense—the possible prejudice was minimal (A 14).

Jurisdiction Below

Jurisdiction in the lower courts was founded under Title 18, §3231, and an indictment filed June 20, 1966 in the United States District Court for the Southern District of New York alleging violations of Title 18, U.S.C. §§331, 371, 1341, 1342 and 1343.

Reasons for Granting the Writ

I. The Petitioner Presents an Important Constitutional Question Which Has Not Yet Been Decided by this Court.

Joint representation of co-defendants presents serious constitutional problems for the courts and ethical problems for counsel. *Glasser* v. *U. S.*, 315 U. S. 60, 86 L.Ed. 680, 625 S.Ct. 457 (1942); *White* v. *U. S.*, 396 F. 2d 822 (5th Cir. 1968); *Ford* v. *U. S.*, 379 F. 2d 123 (App. D. C. 1967); *Loilar* v. *U. S.*, 376 F. 2d 243 (App. D. C. 1967); *U. S.* v. *Gougis*, 374 F. 2d 758 (7th Cir. 1967); *Sawyer* v. *Brough*, 358 F. 2d 70 (4th Cir. 1966); *Campbell* v. *U. S.*, 352 F. 2d 359 (App. D. C. 1965); *Randazzo* v. *U. S.*, 339 F. 2d 79 (5th Cir. 1964); *Porter* v. *U. S.* 298 F. 2d 343 (5th Cir. 1953), cert. denied 346 U. S. 828, 98 L.Ed. 353, 74 S.Ct. 50 (1953); *Craig* v. *U. S.*, 217 F. 2d 355 (5th Cir. 1954); *U. S. ex rel. Williamson* v. *LaVallee*, 282 F. Supp. 968 (E.D.N.Y. 1968); *U. S.* v. *Brierley*, 273 F. Supp. 260 (E.D.Pa. 1967); *U. S. ex rel. Platts* v. *Myers*, 253 F. Supp. 23 (E.D.Pa. 1966); *U. S. ex rel. Miller* v. *Myers*, 253 F. Supp. 55 (E.D.Pa. 1966); *U. S. ex rel. Watson* v. *Myers*, 250 F. Supp. 292 (E.D.Pa. 1966); *Holland* v. *Boles*, 225 F. Supp. 863 (N.D.W.Va. 1963); *Johns* v. *Smyth*, 176 F. Supp. 949 (E.D.Va. 1959).

In *Glasser* v. *United States*, 315 U.S. 60, 71, 86 L.Ed. 680, 699, 625 S.Ct. 457 (1942), this Court held that it was error for the trial judge to assign counsel for one defendant to represent a co-defendant, as they were alleged co-conspirators and counsel might thereby have been hampered. The amount of prejudice, moreover, was not deemed significant, because of the difficulty in assessing prejudice. 315 U.S. at pp. 75-76.

The case at bar presents the same sort of question, but in a retained, as opposed to assigned counsel context. In *Glasser*, this Court stressed the duty of the trial judge to make a searching inquiry, and repeated its admonition in prior cases against discharging that duty "as a matter of rote", 315 U.S. at p. 71. This Court has not yet determined whether the same duty exists where co-defendants, charged as co-conspirators, are represented by one attorney of their own choice, and, in the course of trial, the judge is apprised of the possibility of conflicting interests.

When faced with the problem, the trial judge below simply delegated the task of conducting the inquiry to defense counsel. The Court told petitioner that something called a "conflict of interest" might be present in the case, because of his testimony before the Grand Jury that he was only a sales agent selling on commission. Petitioner was then told that he should consult with the very attorney who might have been under the disability, and then decide if he would like to obtain another lawyer.

The record is bare of any attempt to alert the petitioner of the fact that he was in danger of suffering prejudice by

continuing to be represented by his co-conspirator's lawyer. He was not told that waiver of a jury trial was not in his best interests, because he had testified before the Grand Jury, had a spotless personal record, and that a jury might have been impressed by his candor and reputation, but suspicious of his co-defendant's refusal to testify.

He was not told that the validity of his money-back guaranty was important to show his honest intent, but that evidence of his net worth (which was ample), though helpful to him, would raise suspicions injurious to his co-defendant who is a pauper and could not have offered similar evidence showing that his guaranty was also in good faith.

Petitioner was not told that the impact of the misstatements contained in his letter to U.S. Coin World (Trial Exhibit 13) could have been substantially lessened by his testimony that he was merely repeating what his co-defendant had told him.

Petitioner was not told that the use of witnesses to prove that he was misled by his co-defendant might rebut the claim that he was a co-conspirator.

Finally, petitioner was not told that since Siegal was retained and paid by his co-defendant, he was likely to make his selection of trial tactics with his main client's best interests in mind, and that the result could be very prejudicial to petitioner. In fact, when petitioner consulted Siegal, not only did he not explain any of this to petitioner, he led petitioner to believe there was no danger by stating that separate counsel was not necessary (SM 90).

Attorney Siegal's conduct, assuming there was a conflict, plainly did not satisfy the requirement of full disclosure in Canon 6. Under Canon 6, before an attorney undertakes to represent parties with conflicting interests, he is required to make full disclosure to both clients of the facts, and obtain their express consent. A lawyer represents conflicting interests, as defined in Canon 6, when:

> "In behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Attorney Siegal's conduct was not unethical because he did not realize the implications of the conflict—he felt that if both were innocent, there would be no conflict (SM90). Yet every decision he made favored his main client, rather than petitioner. A jury trial was waived. No evidence of Sheiner's net worth was offered. No testimony by Sheiner was offered to explain the statements in Exhibit 13. No testimony was offered to show that everything Piacentile had told Sheiner about his discovery of the coins was false.

In each of the cases cited above (p. 11), counsel were so deeply involved in the trial of the case, that they, likewise, were not sufficiently detached to appreciate the significance or potential of their conflict of interest. This highlights the desirability of having the trial judge rather than trial counsel explain to the defendant what a conflict of interest is, and the burden upon the lawyer representing co-defendants to act solely in both their best interests.

The Second Circuit held that the statement made by the District Judge and the delegation of duty to defense counsel were "adequate", in view of the fact that due regard

had to be given to the right of the defendant to select and be guided by his own counsel (A 12). This Court ought to consider whether what was said to Sheiner constituted even a warning, let alone a fair warning, to petitioner, such that with all the pressure not to disrupt the proceedings and with his counsel stating that separate counsel was not necessary, petitioner's "waiver" was intelligently made.

II. There Is a Divergence Among the Circuits as to the Interpretation of this Court's Decision in *Glasser* v. *U. S.*

In *Campbell* v. *United States, supra,* Judge Washington ruled that even when the defendants retained their attorney, it was the duty of the Court under the rule in *Glasser* v. *U. S., supra,* to alert them to the risks of joint representation. In *Lollar* v. *U. S., supra,* the same Court, Wright, J., held that under *Glasser,* the Government had the burden of proving the absence of any prejudice. In *Ford* v. *U. S., supra,* Judge Wright concluded that *Glasser* requires the appointment, in the first instance, of separate counsel under Title 18, U.S.C. 3006A(b) for each defendant.

While there is a clear divergence between those holdings and the Second Circuit's decision here, there is also a marked difference in treatment of the rule in *Glasser* between the Second Circuit and the Third, Fourth, Fifth and Sixth Circuits. The latter circuits are far more liberal in granting new trials to defendants who claim that attorneys had conflicting interests and prejudice appeared to have existed. *Sawyer* v. *Brough, supra; Randazzo* v. *U. S., supra; Craig* v. *U. S., supra; U. S. ex rel. Miller* v. *Myers, supra; Holland* v. *Boles, supra.* See, also, *U. S. ex rel. Williamson* v. *LaVallee, supra.*

In *Sawyer* v. *Brough*, the Fourth Circuit said:

> "We realize that this conflict of interest between Sawyer and Espin may not have made its presence felt in their trial and conviction. As is apparent, the trial court did not view Espin's statement as implicating Sawyer. * * * Moreover, court-appointed counsel testified at the hearing before the District Court that he had not felt that any conflict of interest existed between the two defendants since he had not viewed the confession as inculpating Sawyer. Thus, the Attorney's testimony implies that he was not hampered in his representation of either defendant by any attempt to accommodate divergent interests, and that he gave his full efforts and loyalty to each.
>
> "Despite these appearances, we cannot be persuaded that the jealously guarded constitutional right to effective assistance of counsel has been accorded to Sawyer. * * *
>
> "The salient fact remains that divergent interests did exist, and, therefore, an opportunity was presented for the impairment of Sawyer's right to the unfettered assistance of counsel * * *." 358 F. 2d at p. 73.

In *White* v. *U. S.*, the Fifth Circuit ruled that where one defendant can absolve himself at the other's expense, and both are represented by one attorney, under *Glasser*, the failure of the trial court to take effective action is reversible error.

In *Craig* v. *U. S.*, the Sixth Circuit said:

> "We think it follows from the foregoing findings that although Craig was in no way 'deprived' of his right to independent counsel of his own choosing by any act of the District Judge or District Attorney, nevertheless, by reason of a combination of circum-

stances, not reasonably foreseeable by Court or counsel, he did not receive the effective assistance of counsel to which he was entitled under the Sixth Amendment, and that under the particular circumstances of this case he did not intelligently and voluntarily waive such right." 217 F. 2d at p. 359.

In *Holland* v. *Boles,* the District Judge noted:

> "There remains for consideration the effect, if any, of the fact that the record here is devoid of proof that either the regular judge or the special judge was sufficiently aware of the factual situation to recognize and appreciate the inevitable conflict of interests. The effect upon the accused is the same whether or not the court knew Holland was improperly represented. He has not been accorded the effective representation by counsel to which he is constitutionally entitled under the decision of the Supreme Court in *Gideon* v. *Wainright* (sic), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963)." 225 F.Supp. at p. 866.

The Courts below were satisfied with the introduction of Grand Jury minutes of Sheiner's testimony as adequate in bringing to the Court's attention the evidence in his favor. Since the questioning was by a skilled prosecutor seeking an indictment, and since Siegal did not organize the materials or present it fully or forcefully, Sheiner was forced to rely upon the trier of fact to read through eighty-one pages of Grand Jury minutes and, with no assistance from counsel, construct his defense. Plainly, no matter how diligent or fair-minded the trier may have been, this was not an adequate substitute for a loyal advocate. *Von Moltke* v. *Gillies,* 332 U.S. 708, 725-6, 92 L.ed. 309, 321-2, 68 S.Ct. 316 (1948).

Had petitioner been tried in any other circuit but the Second, he would have been granted a new trial. This Court should settle the divergence among the circuits.

Conclusion

The petition for *certiorari* should be granted.

Respectfully submitted,

ALBERT A. BLINDER
STEPHEN HOCHHAUSER
Attorneys for Petitioner

BLINDER AND STEINHAUS
Of Counsel

APPENDIX

Decision of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 413/414—September Term, 1968.

(Argued March 14, 1969 Decided April 4, 1969.)

Docket Nos. 32444/32547

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM SHEINER and VICTOR PIACENTILE, a/k/a VICTOR PEASE,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges,* and McLEAN, *District Judge.**

Appeal from a judgment of conviction for fraud 18 U. S. C. §§331, 371; 1341, 1343, entered in the United States District Court for the Southern District of New York by Zampano, *J.*, after a trial without a jury. Affirmed.

STEPHEN J. HOCHHAUSER, New York, N. Y. (Blinder and Steinhaus, on the brief), *for Appellant Sheiner.*

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* Of the Southern District of New York, sitting by designation.

HERBERT S. SIEGAL, New York, N. Y., on the brief, *for Appellant Piacentile.*

FRANK M. TUERKHEIMER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, for the Southern District of New York, Jack Kaplan, Assistant United States Attorney, on the brief), *for Appellee.*

FEINBERG, *Circuit Judge*:

This appeal is from a judgment of conviction in the United States District Court for the Southern District of New York, after a seven day non-jury trial before Robert C. Zampano, United States District Judge for the District of Connecticut, sitting by designation. In a detailed opinion, 273 F. Supp. 977, Judge Zampano found both appellants guilty on 34 counts charging fraudulent use of the mail or interstate wires, 18 U. S. C. §§1341, 1343, and of one conspiracy count, 18 U. S. C. §371; in addition, appellant Sheiner was found guilty of the sale and possession, and appellant Piacentile of the sale, of fraudulently altered pennies in violation of 18 U. S. C. §331. Appellants were each sentenced to three months imprisonment on one count of the mail fraud charges, to be followed by two years probation on all the other counts. On May 21, 1968, Judge Zampano denied appellant Sheiner's motion to set aside his conviction. In this appeal Piacentile primarily questions the sufficiency of the evidence that the coins in question were fraudulently altered or that he knew that they were. Appellant Sheiner argues only that his rep-

resentation by the same trial attorney as Piacentile was so prejudicial as to deny him the effective assistance of counsel.[1] A review of the relevant facts indicates that these claims are without merit.

I

In April 1965, Piacentile began advertising and selling "multistruck" 1964 pennies to coin collectors and dealers. He alleged that he had discovered the coins in several sealed Federal Reserve bags of pennies which he had purchased for purposes of speculation apparently because of a coin shortage. The coins were impressed with multiple images of Lincoln on their heads; some of them also had a double impression of the date and the word "Liberty." The metal on the "tail" sides of the coins bulged but carried no multiple images. In May 1965, Piancentile approached Sheiner, the owner of a retail coin store, who agreed to help him distribute the coins.

Apparently in reaction to controvresy in the coin world about the authenticity of the pennies as mint errors, appellants advertised and held a demonstration on May 23, 1965, at a coin convention in a New York hotel. Before an audience of about 100 people, Sheiner displayed a sealed Federal Reserve bag which he announced had not been opened previously. A coin dealer present pointed out that such bags could be opened without breaking the seal and

1. Sheiner's brief also points out in its conclusory paragraph that:

> if this Court concludes from co-defendant Piacentile's arguments that the government's evidence was inadequate or that other prejudicial error occurred at the trial, then such conclusions would be equally applicable to defendant Sheiner.

started to demonstrate, but Sheiner snatched the bag back from him before he could finish. Sheiner then cut open the bag, examined the coins in it, and found three of the multi-struck pennies among them. At trial, one of the Government's witnesses demonstrated that a Federal Reserve bag could be opened and closed without breaking the seal. As the Government noted at trial, it is difficult to imagine how appellants could have known in advance—or even hopefully expected—that some of their multi-struck pennies would actually be in a particular Federal Reserve bag, unless they had previously opened it themselves or knew that it had been opened. Yet their advertisements of the show announced with great confidence: "We are opening a new bag containing them [multiple struck pennies]."

In the following weeks Sheiner and Piacentile wrote to a number of coin journals reporting the events of the convention demonstration in several versions. In one such report Federal Reserve personnel at the show were alleged to have authenticated the event; in others it was claimed that Secret Service agents had been offered the bag at the convention, either to determine its authenticity or for confiscation, but had refused to take it. According to the uncontradicted testimony of the Government's witnesses, none of these allegations was true. In the three months following the coin show Sheiner sold over 100 of the coins at prices ranging from $40 to $75 each. Appellants continued to advertise the pennies extensively in the New York Times and on Sheiner's teletype wire to other dealers until their indictment in June 1966.

II

The record below amply supports the trial judge's finding that the pennies were not true mint errors but had been artificially altered to appear multi-struck after they left the mint. The chief government witness, an Assistant Technical Consultant to the Director of the Mint, demonstrated in detail that it would have been physically impossible for the federal mint machinery to have produced the type of multiple impressions found on the Piacentile pennies. In addition, he testified that the coins were too large in diameter to have come from the mint but might have been enlarged by being restruck on some other press, and that the bulge on the tail side of the coins would be a natural result of striking the head after the coin had been removed from its original die, but could not have been caused by multi-striking in the original. Although the defendants, neither of whom took the stand, produced four expert witnesses who testified that they thought the coins were genuine mint errors, none offered a satisfactory explanation of how the mint equipment could have produced the multiple strikes.

Piacentile argues that the conclusion that the coins were artificially altered was merely an "inference" and was impermissibly based on the opinions of the Government's witnesses, rather than on established facts. A persuasive showing that the multi-striking could not have been caused by the mint machinery, however, is substantial proof that they were tampered with after leaving the mint. The Government's expert witness presented a description of the technical operation of the mint as a factual basis from

which to determine the source of the multi-striking. His opinions, based on that factual presentation, were clearly admissible.

> [W]hen the subject matter is of such a technical nature that the proper conclusion to be drawn from the facts depends upon professional or scientific knowledge or skill, qualified experts may express their opinions as to the proper inference to be drawn from a given set of facts, as an aid to the jury in reaching their own conclusion in the case before them.

Richardson, Evidence §387, at 378-79 (9th ed. 1964); see 2 Wigmore, Evidence §557 (3d ed. 1940).

Piancentile also asserts that the trial judge completely disregarded the opposing testimony of the defense witnesses and the cross-examination of the Government's witnesses. There is no indication that the judge failed to evaluate this evidence. Indeed, he specifically took defense testimony into account when he held that "[n]o reasonable explanation was given, even by defendants' experts," of how the coins could be mint errors. 273 F. Supp. at 982. His conclusion must be sustained "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). On the record before us that standard is satisfied.

Piacentile next argues that no proof was evinced that defendants knew or should have known that the coins were altered after leaving the mint, that finding being merely an "inference built upon another inference," which could establish no more than a suspicion of guilt. As we noted above, the finding that the coins were illegally altered out-

side the mint was virtually a corollary of the finding that they were not multi-struck by the mint. While knowledge is a necessary element of the crime of passing or possessing a defaced coin, 18 U. S. C. §331, a finding of knowledge that is largely inferential is not impermissible:

> Knowledge in the mind of another is a subjective thing. It is not always capable of proof by positive or direct evidence. It may be inferred or gathered from the outward manifestations, by the words or acts of the party charged with knowledge and from the facts and circumstances surrounding or attendant upon the act with which it is charged to be connected. It may be proved by all the facts and circumstances disclosed by the evidence taken in connection with the case.

Anderson v. *United States*, 270 F. 2d 124, 127 (6th Cir. 1959); see *United States* v. *Carlson*, 359 F. 2d 592, 597 (3d Cir.), cert. denied, 385 U. S. 879 (1966). Thus, in cases of criminally passing counterfeit United States obligations, guilty knowledge has been held properly inferable from a variety of circumstances, including the incredibility of the defendant's explanation of how she obtained the counterfeits, see *McMillon* v. *United States*, 272 F. 2d 170 (5th Cir. 1959), cert. denied, 362 U. S. 940 (1960); cf. *United States* v. *Petrone*, 185 F. 2d 334 (2d Cir. 1950), cert. denied, 340 U. S. 931 (1951), the existence of circumstances which should have made him suspicious of their genuineness, see *Paz* v. *United States*, 387 F. 2d 428, 430 (5th Cir. 1967) (dictum; guilty knowledge held not proved); cf. *Hagan* v. *United States*, 295 Fed. 656 (6th Cir. 1924), or the number of counterfeits passed over a short period of time, see *Ruiz* v. *United States*, 374 F. 2d 619, 620 (5th Cir.

1967); cf. *United States* v. *Releford*, 352 F. 2d 36, 39 (6th Cir. 1965), cert. denied, 382 U. S. 984 (1966).

At the time of his arrest, Piacentile was still in possession of 245 of the multi-struck pennies; in the preceding months at least 110 had been sold. His explanation to buyers was that he had purchased a large quantity of 1964 pennies, in their sealed Federal Reserve bags, apparently as a speculation because of a coin shortage. When this turned out to be unrewarding, he decided to "return them to the banks." Before doing so, he asked his children to examine the bags to see if there were any errors in the coins, and they found multi-struck coins. The trial judge described this story as "incredible," and no more plausible explanation was offered by the defense at trial. Even if appellants had initially believed in the authenticity of the coins, however obtained, subsequent events could not have failed to raise serious doubts in their minds. Not only was the validity of the coins as mint errors hotly debated in coin collecting circles, but in June 1965, after the technical staff of the mint had examined some of the pennies the Director of the Mint announced that they were not true mint errors but had been altered by private individuals. Nevertheless, appellants continued to market the coins as mint errors, advertising them extensively up until their indictment in June 1966. In addition, their repeated and deliberate falsifications in promoting and advertising the coins—the spurious demonstration of the coins' authenticity at the coin convention and the patently false reports about the events of that show which they circulated to coin publications—were hardly consistent with a sincere belief in the coins' genuineness. The cumulation of this

evidence was sufficient to support a finding that appellants had reason to know that the pennies were fraudulently altered.

The circumstances described above were equally sufficient to support appellants' conviction on the charge of using the mails and wires to defraud. In the light of this evidence, their false publicity reports and persistent advertisements of the coins as "100% mint errors" demonstrated at the very least a reckless indifference to the truth. See *Gusow* v. *United States*, 347 F. 2d 755, 756 (10th Cir.), cert. denied, 382 U. S. 906 (1965); *Irwin* v. *United States*, 338 F. 2d 770, 774 (9th Cir. 1964), cert. denied, 381 U. S. 911 (1965). In sum, we hold that the district court's findings as to the authenticity of the coins and the defendants' guilty intent were supported by substantial evidence.

III

Appellant Sheiner argues that his representation at trial by the same attorney as Piacentile denied him the effective assistance of counsel. After a thorough hearing, the district court denied Sheiner's motion to set aside the conviction on this ground, finding that there was no showing of conflicting interests between the two defendants or of prejudice from the joint representation, and that in any event Sheiner had expressly agreed to the joint defense.

During the second day of the trial, Judge Zampano asked about the relationship between the two defendants. When the Government replied that the evidence would show that Sheiner was the "outlet" for coins provided by Piacentile, the court stated:

> Well, in view of the Government's claim at this point, which may come as a surprise to the defendants, I would like to alert Mr. Sheiner to the fact that if he in any way feels there is now a conflict of interest between the two defendants, I will certainly entertain his request for separate counsel.
>
> I know you are represented by eminent counsel, Mr. Sheiner, one of experience and one of renown, in this city. On the other hand, we now have testimony that the Government is going to claim that you received these coins from Mr. Piacentile. There may be a conflict, and if at any time you feel that you may be in position of having competing interests with Mr. Piacentile, please let me know and I will certainly give you time to talk it over with counsel and perhaps get another attorney.
>
> On the other hand, my mind is wide open. I have not made any conclusions or decisions.
>
> The Government is now claiming that you obtained the coins from someone else. In view of that there might be a difference in your status, you see.

Thereupon, Mr. Siegal, defendants' attorney, conferred with Sheiner, explaining that there might be a conflict of interest on the grounds that Sheiner's knowledge about the coins was based on Piacentile's representations but stating that he did not think separate counsel was necessary. Sheiner also conferred privately with Mr. Walters, an attorney and president of the Retail Coin Dealers Association, who assisted the defense. The following day, the court again addressed appellant:

> Mr. Sheiner, you recall yesterday I made some comment about the possibility that there may be a conflict of interest between your position and Mr.

> Piacentile's, and I indicated if you thought there might be I would give you an opportunity to obtain an attorney, and, in any event, think about it and talk it over with your counsel. Now I understand that you have thought about it, you have considered it, weighed all the aspects of this case, and decided to proceed with Mr. Siegal? Is that correct?

Sheiner replied, "That is correct."

At the hearing on a motion to set aside the conviction, Sheiner testified that he had been advised even before the commencement of the trial to retain his own attorney by a friend and lawyer, Mr. Rubenstein, and that Sheiner had brought up the question with Mr. Siegal, who contacted Mr. Rubenstein and discussed it with him.

It is apparent from the foregoing that Sheiner was alerted to the possible desirability of retaining separate counsel and that substantial consideration had been given to the matter. Although he testified at the hearing that he had not understood what "conflict of interest" meant, we find that the nature of the potential disability of joint representation had been adequately described to him. Both sides stipulated on the motion for a new trial that Mr. Rubenstein would have testified that he told Sheiner that "there might be defenses available to him . . . that were not available to the co-defendant Piacentile, since Sheiner was just selling the coins as agent for Piacentile." Similarly, Mr. Siegal testified that he explained the situation to the defendant in substantially the following words:

> The only possibility of a conflict of interest is a situation that you were the one who did not obtain the coins originally, that you obtained the coins from Pia-

> centile, so possibly there might be a difference of position, because they would have to prove that you had knowledge, any knowledge that they would have to prove would have to come through Piacentile, and you can't go further back than Piacentile because you have no knowledge as to how he obtained the coins, all that you know is what he told you.

In *Glasser* v. *United States*, 315 U. S. 60 (1942), the Supreme Court stressed the importance of representation free from conflicting interests as part of the basic sixth amendment right to the assistance of counsel in criminal defenses, and cautioned that waiver of this right was not lightly to be found. In an assigned counsel context, this court has recently stressed that serious problems are avoided by having representation by separate counsel in criminal cases involving more than one defendant, see *Morgan* v. *United States*, 396 F. 2d 110, 114 (2d Cir. 1968); the potential hazards of joint representation are as likely to be present when counsel is retained as when assigned. However, defendants who retain counsel also have a right of constitutional dimension to representation by counsel of their own choice, see *United States ex rel. Davis* v. *McMann*, 386 F. 2d 611 (2d Cir. 1967), cert. denied, 390 U. S. 958 (1968); that choice should not unnecessarily be obstructed by the court. We think that the evidence in this case shows that Sheiner was clearly informed of the possibility of prejudice from sharing Piacentile's counsel but that he freely made a considered choice to continue Mr. Siegal's joint representation. The court was scrupulous in alerting Sheiner and his counsel to the danger of conflicting interests and in specifically ascertaining that

Sheiner had discussed the question with counsel, considered it and decided to proceed with Siegal. See *United States* v. *Armone*, 363 F. 2d 385, 405-06 (2d Cir.), cert. denied, 385 U. S. 957 (1966); cf. *Olshey* v. *McMann*, 378 F. 2d 993, 994-95 (2d Cir.), cert. denied, 389 U. S. 874 (1967); *Campbell* v. *United States*, 352 F. 2d 359 (D. C. Cir. 1965).

Moreover, we find the actual conflict of Sheiner's and Piacentile's interests and the possible prejudice which the former might have suffered to be so minimal as to warrant affirmance even in the absence of his explicit acquiescence in joint representation. See *United States* v. *Goldberg*, 401 F. 2d 644, 648 (2d Cir. 1968); *United States* v. *Paz-Sierra*, 367 F. 2d 930, 932-33 (2d Cir. 1966), cert. denied, 386 U. S. 935 (1967); *United States* v. *Bentvena*, 319 F. 2d 916, 937 (2d Cir.), cert. denied, 375 U. S. 940 (1963). Sheiner's main contention on this appeal is that separate counsel could have emphasized that he lacked any guilty knowledge, having acted wholly in reliance on Piacentile's story about the coins' origin. However, portions of Sheiner's testimony before the grand jury, introduced at trial, did clearly convey this version—that he had received the pennies from Piacentile, was convinced of their authenticity, and unquestioningly accepted Piacentile's explanation that they had been found in Federal Reserve bags. Moreover, the trial court was well aware of this contention and considered it before finding Sheiner guilty. Sheiner apparently argues that separate counsel could have strengthened this defense by demonstrating the falsity of Piacentile's story of how he found the coins. Proving that would not seem to be helpful to Sheiner, but in any event whether

the story was true in fact is irrelevant to whether Sheiner believed it. Sheiner also complains that certain documents purporting to be guarantees of the pennies' authenticity by Piacentile should have been placed in evidence. The documents were prepared one month after Sheiner's indictment, and were backdated. Putting to one side their dubious value under those circumstances, not only did Sheiner never bring them to Mr. Siegal's attention before the conclusion of the trial, but their use would not have been inconsistent with the interests of Piacentile's defense. Finally, Sheiner contends that his own counsel might have sought to use a variety of trial strategies more advantageous to him such as a jury trial or a motion to sever. However, the possibility that Sheiner's present appellate counsel might have employed different or arguably better trial techniques does not rise on these facts to the level of prejudice sufficient to require a new trial.

Judgment affirmed.

Memorandum of Decision on Defendant Sheiner's Motion to Set Aside His Conviction

(Zampano, D.J.)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

On October 4, 1967, this Court, sitting by designation in the Southern District of New York, found William Sheiner and his co-defendant, Victor Piacentile, guilty on all counts of an indictment charging them with various crimes as a result of their possession and sale of certain altered coins. The Court's findings of fact and conclusions of law are reported at 273 F.Supp. 977 (S.D.N.Y. 1967). On November 21, 1967, Sheiner was sentenced to a three-month term of imprisonment to be followed by two years of probation. Concurrent sentences were imposed on the remaining counts of the indictment.

Sheiner now moves, pursuant to 28 U.S.C. §2255, to set aside the judgment of conviction on the ground he was denied the effective assistance of counsel at trial. A hearing was held on this claim on December 12, 1967, at which time testimony was taken and a schedule was agreed upon for the filing of affidavits and briefs.

Sheiner claims his rights under the Sixth Amendment were violated because Attorney Herbert S. Siegal, who represented both Sheiner and Piacentile as retained counsel, labored under a conflict of interest and was unable to

represent Sheiner effectively. Specifically, he contends that, had he had separate counsel, he would have been advised to take the stand and introduce certain documentary evidence which would tend to exonerate him, but might inculpate Piacentile. Since Attorney Siegal represented both men, Sheiner argues he was deprived of this "separate defense."

The Court finds that the defendant's contentions are without merit.

At the outset it should be noted that at trial Sheiner was represented by two attorneys. Attorney Siegal examined all witnesses, but, within this Court's observation, Attorney Walters, an attorney from Texas who was head of the Retail Coin Dealers' Association actively conferred with Mr. Siegal, the defendants and certain expert witnesses. No claim is made that Attorney Walters ineffectively represented Sheiner's interests during the course of the trial.

The main thrust of the defense at trial was that the coins were legitimate "mint errors" and, even if they were not, the defendants did not possess the requisite criminal intent to warrant a conviction on any of the counts of the indictment. As the record clearly discloses, Attorney Siegal, in cross-examination of government witnesses and by calling several defense witnesses, presented this defense with competence and vigor. Counsel's strategy and presentation at trial lend no support to Sheiner's claim.

Sheiner's contentions with respect to Attorney Siegal's acts of omission must also fail. He asserts that certain documentary evidence, if introduced at trial, would prove he lacked criminal intent because they would demonstrate

that Piacentile "guaranteed" the authenticity of the coins, that Piacentile represented he found the coins in sealed Federal Reserve bags, and that Piacentile "authorized" the various advertisements. At the hearing before the Court these writings signed by Piacentile were produced.

The short answer to this claim is that Sheiner never mentioned or showed these documents to Attorney Siegal prior to or during the trial. Attorney Siegal learned of their existence after the trial and after this Court's decision. Under these circumstances, the failure to offer them at trial can hardly form a basis to challenge Siegal's competency or effectiveness.

In any event, these documents neither reflect a conflict of interest between the defendants nor afford Sheiner the exoneration he seeks. The documents are merely cumulative written evidence of what was before the Court during the trial in the form of oral statements and admissions by the defendants. If the writings were accepted as true on their face, they would tend to exonerate Piacentile as well as Sheiner. The Court was well aware that Sheiner obtained the coins from Piacentile, that the latter represented the coins to be legitimate "mint errors" fortuitously discovered in sealed Federal Reserve bags, and that Piacentile "guaranteed" authenticity. The source of the coins, however, was not dispositive or even crucial in the framework of the government's case; the record clearly discloses that Sheiner cast his lot with Piacentile to an extent sufficient to warrant conviction.

Moreover, Sheiner's "separate defense" contention is at obvious variance with his own status as an experienced

coin dealer. He was the expert, not Piacentile. He independently "appraised" the coins, sent them to other experts for opinion, and exploited his reputation and contact with leading numismatic periodicals to advertise and sell the coins. Sheiner was not Piacentile's dupe.

Under any view of the matter, however, it is clear that Sheiner knowingly acquiesced in the decision to present a single joint defense before the Court. Prior to trial Sheiner discussed the matter of shared counsel with a lawyer friend, Attorney Rubenstein, who suggested he consider separate counsel. After further conference among Sheiner, Siegal, and Rubenstein, Sheiner decided to "go with Siegal" at trial.

In the early stages of the trial, this Court, upon first hearing the government's evidence that Sheiner received the coins from Piacentile, promptly halted the trial and stated to Sheiner:

> I would like to alert Mr. Sheiner to the fact that if he in any way feels there is now a conflict of interest between the two defendants, I will certainly entertain his request for separate counsel.
>
> I know you are represented by eminent counsel, Mr. Sheiner, one of experience and one of renown, in this city.
>
> On the other hand, we now have testimony that the Government is going to claim that you received these coins from Mr. Piacentile. There may be a conflict, and if at any time you feel that you may be in a position of having competing interests with Mr. Piacentile, please let me know and I will certainly give you time to talk it over with counsel and perhaps get another attorney.

Memorandum of Decision on Defendant Sheiner's Motion to Set Aside His Conviction

On the other hand, my mind is wide open. I have not made any conclusions or decisions.

The Government is now claiming that you obtained the coins from someone else. In view of that there might be a difference in your status, you see.

Sheiner discussed the Court's remarks with Siegal and Walters and then with Walters privately. The next day, the Court was informed that Sheiner had decided to continue with Attorney Siegal. The Court then asked Sheiner if he "thought about it," "considered it," "weighed all the aspects of this case" before deciding "to proceed with Mr. Siegal." Sheiner answered, "That is correct."

Under these circumstances, Sheiner cannot be heard to say his constitutional rights were violated. *United States* v. *Armone*, 363 F.2d 385, 406 (2 Cir. 1966), cert. denied, 385 U.S. 957 (1966); *United States* v. *Pan-Sierra*, 367 F.2d 930, 932 (2 Cir. 1966), cert. denied, 386 U.S. 935 (1967); *Kaplan* v. *United States*, 375 F.2d 895, 898 N.4 (9 Cir. 1967), cert. denied 389 U.S. 839 (1967); *United States* v. *Rundle*, 273 F.Supp. 438, 441 (D.C.Pa. 1967).

Accordingly, defendant William Sheiner's motion is denied.

Robert C. Zampano
United States District Judge
sitting by designation

Dated: May 21, 1968.

Decision After Trial

(Zampano, D.J., 273 F. Supp. 977)

Memorandum of Decision

In this case, tried to the Court without a jury, the defendants were charged with mail fraud, 18 U.S.C. §1341[1], fraud committed through interstate communication by wire, 18 U.S.C. §1343[2], fraudulent possession and sale of altered coins, 18 U.S.C. §331[3], and conspiracy, 18 U.S.C. §371[4].

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1. Whoever, having devised or intending to devise any scheme or artifice to defraud, * * *, or to sell, dispose of, * * * or procure for unlawful use any counterfeit or spurious coin, * * *, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. Whoever, having devised or intending to devise any scheme or artifice to defraud, * * *, transmits or causes to be transmitted by means of wire, * * * in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

3. Whoever fraudulently possesses, passes, utters, publishes or sells, or attempts to pass, utter, publish, or sell, or brings into the United States, any such coin, knowing the same to be defaced, mutilated, impaired, diminished, falsified, scaled, or lightened—Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

4. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Decision After Trial
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During the seven day trial, the Court heard the testimony of fifteen government witnesses and six defense witnesses. Numerous exhibits, photographs and slides, as well as movies of the coin minting process, were introduced. The defendants did not testify.

THE INDICTMENT

Counts 1 through 27 of the indictment charge both defendants with knowingly devising a scheme to defraud coin collectors and dealers by inducing them to purchase certain 1964 one-cent coins which had been fraudulently altered to appear to be legitimate "mint errors." The defendants used the mails to insert advertisements in the New York Times, offering the altered coins for sale for more than $25 each.

Counts 28 through 34 charge both defendants with sending certain letters, teletypes and telegrams in order to promote and execute their fraudulent scheme. Count 35 alleges defendant Piacentile, also known as Pease, sold approximately ten of the altered coins to interested purchasers, and count 36 charges defendant Sheiner with a similar crime. Count 38 is the fraudulent possession count against Sheiner alone while count 39 alleges that both defendants conspired to commit the violations described in the other counts.

ISSUES

[1] The Court finds from the uncontroverted testimony and the stipulations entered into between counsel that the government proved beyond a reasonable doubt all the

material allegations in each count of the indictment relating to the defendants' possession of the coins in question, their sale of the coins to interested collectors and dealers, and their use of the mails and interstate wires to advertise and promote the sale of the coins to the public.

The primary issues remaining are 1) were the coins fraudulently altered, and 2) if so, did either one or both of the defendants possess the requisite knowledge and fraudulent intent necessary to sustain a conviction under the statutes.

ADVERTISING AND SALE OF THE COINS

In April, 1965, Piacentile began selling certain 1964 multi-struck, one-cent coins to interested collectors and dealers. These coins had a multiple image of Lincoln's face on the obverse side of the coin. On most coins there appeared also a double impression of the date "1964" and the word "Liberty." The back of each coin contained a bulge in the metal, but there were no multiple images thereon. The selling price of these coins at this time was $4.00 for a roll of fifty pennies, with a "money back guarantee" if "they were proven to be otherwise" than as represented. Several of the early purchasers had the coins checked by other collectors and dealers to determine whether or not the coins were authentic Mint errors. At least one purchaser returned the coins to Piacentile, who refunded the purchase price without objection.

In early May, 1965, Piacentile approached Sheiner, the owner of a retail coin shop known as Bronx Coins, to deter-

mine whether Sheiner would help him dispose of the coins. After an inspection of the coins, Sheiner agreed. A few days later, Sheiner gave some coins to a local dealer who, after examining them, referred the matter to the Secret Service. The federal agency's interest in the coins provoked controversy among coin collectors as to their authenticity. In an attempt to settle the dispute, Sheiner conducted a coin show on May 23, 1965, in the Henry Hudson Hotel, advertising the event in the New York Times of May 18, 1965, in part as follows:

"FABULOUS

JUST DISCOVERED

1964-P Multiple Struck Cent

Authentic—Beautiful—Unusual—Terrific

We are opening a new bag containing them."

In the presence of over a hundred people and flanked by two Pinkerton guards, Sheiner placed a Federal Reserve bag on a table. He announced to the audience that the sealed bag had not been opend previously. A coin dealer in the audience informed Sheiner he could open the bag without tearing the seal. Sheiner offered the sealed bag to the dealer who started to remove the seal. But Sheiner grabbed the bag from the dealer and cut it open with a pair of shears. He thereafter examined each of the coins until he "found" three multi-struck coins. At this point a Secret Service agent in the audience questioned Piacentile concerning the source of the coins. Piacentile replied that he could not reveal that information.

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During the following months Sheiner sold over 100 multi-struck coins at prices varying from $40 to $75 each. In September, 1965, a grand jury was convened to investigate whether Sheiner and Piacentile were violating federal laws. Sheiner chose to testify and answered all questions addressed to him.

Even after the grand jury proceedings, the defendants placed many advertisements in the New York Times, urging the public to buy coins from the "Piacentile Find." Typical advertisements read in part as follows:

"THE FABULOUS
1964-P

MULTIPLE STRUCK
CENT

Guaranteed 100% Mint Error
We found them in
Fed. Reserve Sealed Bags"
New York Times, February 20, 1966.
"1964-P

MULTIPLE STRUCK CENTS

* * *

All coins brilliant uncirculated gems.
All coins guaranteed to come from the original PIACENTILE FIND and are 100% mint errors"

New York Times, April 17, 1966.

In addition, Sheiner utilized his teletype service to advertise and sell these coins throughout the country.

The defendants were arrested on June 21, 1966. A search of Piacentile's apartment disclosed an additional 245 multi-struck coins in a suitcase.

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AUTHENTICITY OF THE COINS

At the trial each side offered expert testimony concerning the authenticity of the coins sold or possessed by the defendants. The Court credits the testimony of Morris Boley, Assistant Technical Consultant to the Director of the United States Mint, in its entirety on all material issues with respect to the validity of the coins. Mr. Boley's qualifications were unimpeachable, and the Court was impressed with his practical experience, technical knowledge, and general demeanor.

Mr. Boley concluded that the coins in question were genuine one-cent pieces which had been altered by impressing a second image upon them after they left the Mint. Therefore, they could not be legitimate Mint errors.

During a lengthy examination, Mr. Boley, with the aid of movies, slides, model dies and photographs, carefully and thoroughly supported his factual opinions. It would serve no useful purpose to review here all the details of his technical, scientific testimony. Reference to a few basic facts concerning the mechanics of manufacturing coins will demonstrate the logic of his conclusions.

The type of press which produced the 1964 Mint pennies was equipped with dual sets of dies: two obverse or head dies and two tail dies. Each stroke of the press produced two coins. The head dies were firmly held in place by three set screws. The lower dies were made of carbon steel with diameters of .739 of an inch. They moved up and down in steel collars with diameters of .748 of an inch. To stamp coins, a reciprocating feed mechanism would convey

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blanks into the press. The feed was equipped with metal fingers which would pick up two blanks at a time and deposit them in the coinage collars holding the lower dies. The fingers would then withdraw to pick up two more blanks for the next stroke.

While the blanks were in the collar the upper and lower dies would come together to impress the blanks into pennies under a pressure of 45 tons per square inch. After the strike the upper die would release and the lower die would raise the pennies flush in the collar. The fingers would come forward, push the two new pennies into a receptacle, and then deposit the next two blanks into the collars for the next stroke of the press. The press stamped approximately 300 pennies per minute.

Therefore, there were only two possible ways the Mint could have produced 1964 pennies with a double image: either the coin itself or the instrument producing the impression on the coin must have rotated after the first strike.

The coin rotation theory must be rejected. Obviously, if the coin did not rotate in the collar after the first strike, the action of the dies on the second strike would impress the tail sides of the once struck coins with a second image. But the tail sides of the defendants' coins bear no displaced images. This alone negates the possibility that the coin rotated in the collar after the first strike. In addition, the coin rotation theory necessarily requires that the pennies remain in the collar after the first strike. This means that [illegible]

usual mechanical failures: the lower die must fail to raise the coins out of the collar or the feed fingers must fail to push the pennies off the collar after the first strike and, in either case, the feed fingers must also fail to place two new blanks on the collar to replace the normally ejected, struck coins. The Court is satisfied that the only way to multi-strike a penny by rotating it in the Mint would be to dismantle the press and hand-feed the blank through one cycle of the press.

The theory that the Mint's upper dies rotated or "rattled" to produce the coins in evidence also must be rejected. A rotation or rattle of the upper dies on descent, due to the highly improbable failure of the set screws to hold, would either smash the dies or mangle the coins. A further reason for ruling out the possibility of a loose die or die holder causing double-struck coins is based on the "coin turn" principle. Boley explained that the head side of a Mint coin is lined up with its tail side so that if the head side is "head side up, vis-a-vis the observer, and the coin is inverted on its horizontal axis, the tail side will also be right side up, vis-a-vis the observer. With respect to each of the coins in question, the "coin turn" test revealed that the heavy impression on the head side and the tail side bore the proper relations up to each other. No reasonable explanation was given even by defendants' experts, as to how a loose die or die holder could cause various strikes on the face of a coin and always make the second strike or heavy impression in just the right place.

In addition, Boley testified that 210 of the 287 questioned coins in evidence had diameters in excess of .750 of an inch, with some running as high as .759. In his experi-

ence he had never seen a Mint coin with a diameter in excess of .753 of an inch. Further, an examination of the defendants' coins disclosed that ten distinct types of altering tools were employed to impress them with a second image. None of these tools was similar to any die mechanism used at the Mint to produce 1964 pennies.

[2] Under these circumstances, the Court finds that the defendants' coins were genuine pennies which had been altered after they left the Mint. These coins, therefore, were not Mint errors.

KNOWLEDGE AND INTENT

The remaining issues for the Court are whether the government proved beyond a reasonable doubt the scheme to defraud and the requisite knowledge and intent necessary to support convictions under the charges alleged in the indictment.

[3] The statutory crimes of mail fraud and fraud by wire, 18 U.S.C. §§1341, 1343, are broad in their scope and may ordinarily be shown by proof of the intentional devising of a scheme to defraud and the use of the mails or wire communications in furtherance of the scheme. United States v. Conte, 349 F.2d 304, 306 (6 Cir. 1965), cert. denied, 382 U. S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339; United States v. Houlihan, 332 F.2d 8, 13 (2 Cir. 1964), cert. denied, 379 U. S. 828, 85 S.Ct. 56, 13 L.Ed.2d 37; United States v. Baren, 305 F.2d 527, 528 (2 Cir. 1962). In interpreting these statutes, the courts have reached a great variety of stratagems aimed at obtaining money by fraudulent representations through the use of the mails or wire

communications. See United States v. Conte, supra (corporate bonds); Babson v. United States, 330 F.2d 662 (9 Cir. 1964), cert. denied, 377 U. S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1045 (jet training school); United States v. Baren, supra (knitting machines); Schaefer v. United States, 265 F.2d 750 (8 Cir. 1959), cert. denied, 361 U. S. 844, 80 S.Ct. 97, 4 L.Ed.2d 82 (razor blade vending machines); United States v. Kyle, 257 F.2d 559 (2 Cir. 1958), cert. denied, 358 U. S. 927, 79 S.Ct. 312, 3 L.Ed.2d 301 (gift toy club); Linden v. United States, 254 F.2d 560 (4 Cir. 1958) (annual business directory); United States v. Owen, 231 F.2d 831 (7 Cir. 1956), cert. denied, 352 U. S. 843, 77 S.Ct. 42, 1 L.Ed.2d 59 (nursery plants); Deaver v. United States, 81 U. S. App. D.C. 148, 155 F.2d 740 (1946), cert. denied, 329 U. S. 766, 67 S.Ct. 121, 91 L.Ed. 659 (burial lots); United States v. Dilliard, 101 F.2d 829 (2 Cir. 1938), cert. denied, 306 U. S. 635, 59 S.Ct. 484, 83 L.Ed. 1036 (mortgage pool).

[4-10] Criminal intent and guilty knowledge, essential elements for conviction under the various charges in the instant indictment, need not be established by direct proof; they may be inferred from the statements and conduct of the defendants. Gusow v. United States, 347 F.2d 755, 756 (10 Cir. 1965), cert. denied, 382 U. S. 906, 86 S.Ct. 243, 15 L.Ed.2d 159; Estep v. United States, 140 F.2d 40, 45 (10 Cir. 1943); Stone v. United States, 113 F.2d 70, 75 (6 Cir. 1940). If the defendants' acts were done inadvertently, mistakenly, or in good faith without an intention to defraud, then the government has not sustained its burden of proof, and the defendants must be acquitted. United States v. Baren, supra, 305 F.2d at 533; Silverman v. United States,

213 F.2d 405, 407 (5 Cir. 1954), cert. denied, 348 U. S. 828, 75 S.Ct. 46, 99 L.Ed. 653; Deaver v. United States, supra, 155 F.2d at 744; Hawley v. United States, 133 F.2d 966, 972 (10 Cir. 1943). Some reasonable latitude is permissible when one extols the merits of one's product or engages in a certain degree of "puffing" or "salesmanship" to sell one's product. Babson v. United States, supra, 330 F.2d at 664.

[11, 12] On the other hand, if the defendants acted wilfully and purposely with an evil intent, or with a reckless indifference to the truth, then they are chargeable with the requisite knowledge and criminal intent. Irwin v. United States, 338 F.2d 770, 774 (9 Cir. 1964), cert. denied, 381 U. S. 911, 919, 85 S.Ct. 1530, 14 L.Ed.2d 433; United States v. Rabinowitz, 327 F.2d 62, 78 (6 Cir. 1964); Stone v. United States, supra, 113 F.2d at 75. In a leading case, Judge Learned Hand stated:

> "* * * that although a man might not be charged for his honest beliefs, however imbecile they might be, it was not necessary to show that he disbelieved what he said. Some utterances are in such form as to imply knowledge at first hand, and the utterer may be liable, even though he believes them, if he has no knowledge on the subject. And all unconditional utterances, intended to be taken seriously, imply at least a belief, and, if the utterer does not believe them, they are false, though his mind be quite indeterminate as to their truth." Knickerbocker Merchandising Co. v. United States, 13 F.2d 544, 545 (2 Cir. 1926), cert. denied, 273 U. S. 729, 47 S.Ct. 239, 71 L.Ed. 862.

See also Holmes v. United States, 134 F.2d 125, 133 (8 Cir. 1943), cert. denied, 319 U. S. 776, 63 S.Ct. 1434, 87 L.Ed.

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1722; United States v. Rowe, 56 F.2d 747, 749 (2 Cir. 1932), cert. denied, 286 U. S. 554, 52 S.Ct. 579, 76 L.Ed. 1289. Moreover, the deception need not result from the verbalized representations alone. The arrangement of the words in an advertisement in order to attract a particular segment of the public may itself convey a false appearance. Linden v. United States, supra, 254 F.2d at 168.

Applying these general principles to the credible evidence in the instant case, it is clear that the government has sustained its burden of proof on the issues of knowledge and intent on each count of the indictment.

The only question were [illegible] determining the [illegible] [illegible] the defendants induced interested coin collectors and dealers to purchase these coins in the expectation they would receive [illegible] mint errors." The [illegible] the coin collector's world was alluring and attractive indeed, yet false and deceptive in fact.

[illegible] is ample evidence in the record that the defendants acted with criminal intent and guilty knowledge. [illegible] [illegible] hundreds of these altered coins [illegible] [illegible] defendants. These coins were [illegible] [illegible] at a considerable investment of time and money. The defendants' explanation to collectors that all these coins [illegible] their way into [illegible] of the Federal Reserve bags, fortuitously discovered [illegible] Philadelphia mint, [illegible] In order to exploit the average collector's [illegible] to add a "rarity" to his collection, the defendants conceived a scheme to clothe their coins with authenticity and to deceive interested persons who otherwise would have been [illegible]. The "show" at the

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Henry Hudson Hotel was an elaborate hoax in this direction. Moreover, in June, 1965, the defendants were aware that officials at the Mint had appraised the coins and concluded they had been "altered by private persons subsequent to issuance by the mint." The defendants' public rebuttal that the Mint "never admits errors" was a misrepresentation intended to beguile amateur collectors. Despite grand jury investigations of their activities, the defendants persisted in deceptive advertising to entice coin collectors of ordinary prudence and comprehension to make purchases which they otherwise would not have made. See United States v. Press, 336 F.2d 1003, 1011 (2 Cir. 1964), cert. denied, 379 U. S. 965, 85 S.Ct. 658, 13 L.Ed.2d 559, Fry v. United States, 379 U. S. 973, 85 S.Ct. 670, 13 L.Ed.2d 563. In addition, the defendants intentionally published a series of falsehoods to aid their scheme to convince the coin world that the "Piacentile Find" was authentic. Two examples illustrate the deception. In a letter to *Coin World*, a leading and respected newspaper for numismatists with a weekly circulation of 108,000, Sheiner wrote for publication that at the Henry Hudson Hotel "opening," he "offered the bag with the seal intact to the secret service agents to bring back to the mint to do whatever was necessary to determine the authenticity of the sealed bag," but the agents refused his offer. To *Numismatic News*, another well-known periodical, Sheiner wrote that the discovery of the coins had been "authenticated" by Federal Reserve people. These statements were materially false. Enthusiasm cannot justify, nor optimism excuse these deliberately false representations. Further, defendants' attempts to convince collectors and dealers that "other per-

sons'' had also ''discovered'' similar multi-struck coins and the defendants' ''money back'' guarantee advertising were calculated devices to deceive. See Irwin v. United States, supra, 338 F.2d at 775-76; United States v. Press, supra, 336 F.2d at 1007; United States v. Sylvanus, 192 F. 2d 96, 105 (7 Cir. 1951), cert. denied, 342 U. S. 943, 72 S.Ct. 555, 96 L.Ed. 701.

Accordingly, the Court finds that the government has sustained its burden of proof beyond a reasonable doubt as to each essential element of each crime alleged in the indictment. The defendants are guilty as charged.

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No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1969

WILLIAM SHEINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Having waived trial by jury, petitioner was convicted on 34 counts charging use of the mails and interstate wires in furtherance of a fraudulent scheme (18 U.S.C. 1341, 1343); on 3 counts charging sale or possession of fraudulently altered United States coins (18 U.S.C. 331); and on 1 count charging a conspiracy to commit the offenses. *United States* v. *Sheiner*, 273 F. Supp. 977 (S.D.N.Y.). On November 21, 1967, petitioner was sentenced to three months' imprisonment on the first count; imposition of concurrent two-year sentences on the remaining counts was suspended and he was placed on probation for two years, to commence upon the expiration of the three months' sentence.

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Petitioner thereafter moved to set aside the judgment, pursuant to 28 U.S.C. 2255, on the ground that he had been denied effective assistance of counsel because of a conflict of interests between himself and his co-defendant who were represented by the same retained counsel. Following a hearing on this issue, the district court (by the same judge before whom the case had been tried) denied the motion on May 21, 1968 (Pet. App. 15–19). The court of appeals affirmed the judgment of the district court on April 4, 1969.[1]

The sole question presented is whether petitioner was deprived of the effective assistance of counsel by virtue of the attorney's joint representation of petitioner and the co-defendant. Both courts below carefully examined this claim and found that petitioner had made an informed and considered choice to proceed with a single retained counsel. We rely upon the opinions below and, for the reasons stated therein, urge that the petition for a writ of certiorari should be denied. There is no conflict among the Circuits as to the facts presented here. In none of the cases upon which petitioner relies (Pet. 11) did the trial judge, as here, personally apprise petitioner of the possibility of a conflict of interest and assure himself that petitioner nonetheless wished to proceed with counsel also representing a co-defendant. Indeed the opinions in both *Ford* v. *United States*, 379 F. 2d 123 (C.A. D.C.), and *Campbell* v. *United States*, 352 F. 2d 359

[1] The facts underlying the conviction are summarized in the opinion of the district court (273 F. Supp. at 980–984) and in the opinion of the court of appeals (Pet. App. A3–A9). The co-defendant's petition, which challenges the sufficiency of the evidence, is before this Court in No. 205 Misc., O.T., 1968.

(C.A.D.C.), suggested that trial courts follow a procedure similar to that employed by the district judge here.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1969.

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